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IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1962

No. 294

CATHERINE CLINTON

Peititoner

vs.

COMMONWEALTH OF VIRGINIA

Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

[redacted]

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BRIEF FOR THE PETITIONER

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7

AUTHORITIES

Cases

Boyd vs. *United States,* 116 U. S. 616, 630, 6 S. Ct. 524, 532 29 L. Ed. 746 11

Clinton vs. *Commonwealth,* 204 Va. 275 1

Goldman vs. *United States,* 316 U. S. 129, 62 S. Ct. 993, 86 L Ed. 1322 11

Lopez vs. *United States,* 83 S. Ct. 1381 11

Mapp vs. *Ohio,* 367 U. S. 643, 6 L. Ed. (2d) 1081... 10

Olmstead vs. *United States,* 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 12

On Lee vs. *United States,* 343 U. S. 747, 766-767, 72 S. Ct. 967, 977-978 9

Silverman vs. *United States,* 365 U. S. 505, 81 S. Ct. 679, L. Ed. (2d) 734 7

MISCELLANEOUS

Dash, Knowlton and Schwartz, *The Eavesdroppers* 8

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OPINIONS BELOW

There were no reports of the trial court's decisions.

The Decision of the Supreme Court of Appeals for Commonwealth of Virginia has been reported in the advance sheets as *Clinton* vs. *Commonwealth,* 204 Va. 275. A copy of said opinion is annexed as Appendix A.

JURISDICTION

The judgment o fthe Supreme Court of Appeals for the Commonwealth of Virginia was entered on April 22, 1963; there were no petitions for rehearing and no orders granting an extension of time in which to petition for a Writ of Certiforari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Section 1257 (3).

QUESTIONS PRESENTED

Whether evidence obtained by City Police Officers through the use of a spiked microphone stuck into a partywall separating adjoining efficiency apartments, which enabled the Police Officers to overhear everything said in the contiquos private efficiency apartment occupied by petitioner, is admissable against the petitioner in a State Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, Constitution of the United States:

"No person shall be heard to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A two count indictment was returned by the Grand Jurors at the December, 1961 term of the Corporation Court of the City of Norfolk, Virginia. The petitioner was chraged with the violation of 18.1-208 of the Code of Virginia 1950 as amended, knowingly receiving money from the earnings of a prostitute, not being for consideration deemed good or valuable in law, and of violation of 18.1-205 of the Code of Virginia 1950, as amended, unlawfully placing a female in a house of prostitution with the intent that she should live the life of a prostitute.

Petitioner was first tried in the Corporation Court of the City of Norfolk, Virginia, on the 26th day of February, 1962, at which time the jury was unable to agree upon a verdict, wheheupon they were discharged. Petitioner was again tried in said Court on 22 March 1962, at which time the Jury found the petitioner guilty as charged and fixed her punishment

at five (5) years imprisonment and a fine of Five Hundred Dollars. ($500.00).

During retrial, City Police Officer, Earl H. Beach, testified that beginning October 21, 1961, he was assigned to keep surveillance of Apartment 103 which apartment had been rented by petitioner and her husband under another name. Police Officer Beach kept the apartment under surveillance from the street on 21 October 1961, and on 23 October 1961, he began a surveillance from the adjoining apartment, Apartment 102. (R.37). In response to a question as to how he could hear from the next apartment, Police Officer Beach, testified as follows at R. 37, 38:

A. Yes, Sir. Some of the time I was in the bathroom. From the medicine cabinet, you could hear part of the conversation there and I had a device that would amplify the sound so that you could hear it in the other room.

Mr. Reid: Spiked Device?

A. Yes, Sir: small device.

Mr. Reid: Object to anyhting he heard with the spiked device and object to his testimony in its entirety unless he could tell what portions that he could hear to with his ear to the medicine cabinet.

Mr. Whitehurst: Your honor, this is also in the next door apartment; listening to what

was going on in the apartment that this defendant forged a name. I suggest this is material for the jury to hear. What he can hear, whether he used a device or had a hearing aid or even put on glasses, this gets to the truth and should come in.

Mr. Reid: On the basis of the spiked device, Your Honor, it is an unreasonable seizure under the 4th Amendment of the Constitution. As such I submit to the Court, it is not admissible. Secondly, the Police Officer testified that part of the conversation he could hear through the medicine cabinet.

Unless he can qualify as to what portion of that he heard through that, I submit his tsetimony should be stricken en toto.

* * *

The Court: Overruled. Exception noted.

Mr. Reid: Save the point, if Your Honor please.

On cross examination, Police Officer Beach, testified further as follows, R.13.

Q. "This spike, was it driven in the wall?

A. It wasn't driven in.

Q. Stuck in the wall?

A. Yes, Sir.

Q. In what portion of the apartment was that?

A. The whole apartment was just one-room efficiency. It would be in the wall that was separating the two apartments."

At the conclusion of trial, trial counsel for petitioner again moved that the evidence of Officer Beach be stricken, R.49, 50.

Mr. Reid: Very well, your Honor. Secondly, I would like to renew my motion, as to striking the evidence of Officer Beach for the purpose that it was irrevelent, immaterial and it had nothing to do with the case before the Court. Also, the evidence of Officer Beach admittedly was obtained, in part, not en toto, by a listening device which was stuck into the wall. According to the decision of the Supreme Court of the United States, it was unlawful as search and seizure. According to the search warrant ,any evidence received from the apartment where that book came from, would be an unlawful seizure. I would like to ask the Court to strike the evidence.

* * *

The Court: "I will let it go to the jury and that's it. I over rule all motions.

Police Officer Beach continued his surveillance of the apartment rented by petitioner by means of the spiked device on 23, 24 and 25 October, 1961. (R. 39, 40 and 41). The surveillance was terminated by a raiding party breaking into the apartment rented by petitioner and there was no evidence of any search warrant. (R. 43, 44 and 45).

Upon grant of a Writ of Error and Supersedeas, the Supreme Court of Appeals of Virginia, affirmed the conviction of Petitioner. The Court distinguished *Silverman* vs. *United States,* 365, U. S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734, on the grounds that the record showed that there was only a small penetration on the wall by the spiked device and that the record does not show, "That eavesdropping was accomplished through 'an unauthorized physical penetration into the premises' occupied by the defendant. (Appendix Page 11a).

REASONS FOR GRANTING THE WRIT

The increasing incidence of the use of electronic eavesdropping devices by Police Officers coupled with the startling scientific advancements increasing their effectiveness results in a threat to the security of the people in their homes from unreasonable auditory searches by investigating officers and commends the evidentiary problem posed by this case to review by this Court.

1. The decision of the Supreme Court of Appeals of Virginia, the Court below, is squarely in conflict

with the views expressed by this Court in *Silverman* vs. *United States,* 365 U. S. 505. The *Silverman* case presented a factual situation where the investigating officers used a spiked electronic listening device whose spike extended almost one foot and was inserted under the molding of an adjoining row house causing the spike to come in contact with the heating system of the house occupied by the petitioner; thus, the heating system became a giant microphone relaying conversations of the petitioners. In the instant case, the investigating officer testified that he used a "spike device" which was "stuck in the wall" separating the one-room efficiency apartment rented by the petitioner from the one-room efficiency apartment occupied by the Police Officer. The significance and importance of the use of a "spike mike" for eavesdropping in the instant case is set forth in Dash, Knowlton Schwartz, *The Eavesdroppers,* where in its section on "Tools" it said at Page 341:

> **"Where access to the room is impossible, "contact mikes" are available which can pick up sounds through a common wall. The microphone is fastened to the wall with a spike which is driven into the common stud between the rooms, that is, the common column to which the lath or wallboard is fastened. Obviously, there are a few cases where common studding is not used, and in such cases, this type of eavesdropping is impossible."**

Thus, where a "spike mike" is used, there must be contact with a common stud or column connecting

the lath or wallboards of the adjoining rooms. It, in effect, makes the common stud or column a small microphone, through which the investigating officer can hear the conversation of suspected persons in an adjoining apartment. Thus, the investigating officer is picking up voices inside of the protected premises rather than amplifying sounds heard outside of the protected premises. It is submitted that this unauthorized picking up of voices within private premises is the trespass needed to render this an unconstitutional search and seizure. *Cf On Lee* vs. *United States,* 343 U. S. 747, 766-767, 72 S. Ct. 967, 977-978 (Burton J, Dissenting). Admittedly, the "spiked mike" used in the instant case was smaller in size than the "spike mike" used in the *Silverman* Case. Although different in size, it is exactly the same in principal. Therefore, it is submitted that the lower court erred in distinguishing the instant case from *Silverman* on the grounds that there was no showing that, "the eavesdropping was accomplished through an unauthorized physical penetration into the premises occupied by defendant."

In the majority opinion of *Silverman,* the Court said in its final sentence at Page 512:

> **"We find no occasion to re-examine Goldman here but we decline to go beyond it, by even a fraction of an inch."**

In the instant case the "fraction of an inch" beyond *Goldman* is presented to this Court for its decision. This Court is now presented with the oppor-

tunity to demonstrate it means what it said in *Silverman.*

The question of going "a fraction of an inch" beyond *Goldman* where a detectaphone was utilized, is squarely presented here. The evidence that a "spiked mike" was used by being stuck in the wall is uncontradicted. At trial, Counsel objected to the introduction of evidence obtained by use of the "spiked mike" as an unconstitutional search and seizure at the end of trial, counsel moved that the evidence obtained by use of "spiked mike" be stricken as it was obtained by an unconstitutional search and seizure, and the issue of the constitutionality of such evidence was raised by assignment of error to the Supreme Court of Appeals of Virginia and there decided adversely to the petitioner. It is submitted that this Court should now demonstrate to investigating officers, and provide them with the standard, that the use of a "spiked mike" type of listening device is an unconstitutional search and seizure. Ceratinly, this rule applies not only to federal officers under *Silverman* vs. *United States, supra,* but also to State and local police officers by the authority of *Mapp* vs. *Ohio,* 367 U. S. 643, 6 L. Ed (2d) 1081. It is further submitted that this evidenciary rule is drastically needed in view of the recent rapid developments in the fields of electronic eavesdropping and would place all investigating officers on notice, that any evidence obtained by use of a spiked electronic listening device would be inadmissible in the prosecution of a criminal offense as an unconstitutional search and seizure.

2. In the event that this Court should hold that the facts of the instant case do not place it within the ambit of *Silverman* vs. *United States, supra,* and that the instant case is controlled by *Goldman* vs. *United States,* 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322, it is submitted that *Goldman* vs. *United States, supra,* and the cases determining it should be reviewed as to whether they are sound in relation to the Fourth and Fifth Amendments.

In *Boyd* vs. *United States,* 116 U. S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed. 746, this Court said:

> **"Breaking into a hosue and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgement. In this regard the Fourth and Fifth Amendments run almost into each other."**

As set forth by Justice Brennan, in his comprehensive and incisive dissent in *Lopez* vs. *United States,* 83 S. Ct. 1381, at 1397:

> **"The authority of the Boyd decision has never been impeached. Its basic principal that the Fourth and Fifth Amendments interact to create a comprehensive right of privacy, of individual freedom, has been repeatedly approved**

in the decisions of this Court." (see decisions there cited).

And, Justice Brennan, further stated, *supra,* at page 1398:

> **"I think it is demonstrable that Olmstead was erroneously decided, that its authority has been steadily sapped by subsequent decisions of the Court, and that it and the cases following it are sports in our jurisprudence which ought to be eliminated."**

Justice Brennan, in his dissent, succinctly sets forth why *Olmstead* vs. *United States,* 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, and the cases it controlls including *Goldman* vs. *United States, supra,* should be re-examined to determine their soundness. On this basis, if it is determined that *Goldman* vs. *United States, supra,* controls the instant case, it is submitted that the Court should review and re-examine its holding in the *Goldman* case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

CALVIN H. CHILDRESS
Counsel for Petitioner

APPENDIX.

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Present: All the Justices.

CATHERINE CLINTON

-v- Record No. 5558

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE HAROLD F. SNEAD

Richmond, Virginia — April 22, 1963

FROM THE CORPORATION COURT
OF THE CITY OF NORFOLK

H. Lawrence Bullock, Judge

Catherine Clinton was indicted on two counts charging (1) that she did feloniously receive money from the earnings of Katherine R. Taylor, who was engaged in prostitution, for a consideration not deemed good and valuable in law in violation of § 18.1-208, Code of 1950, as amended, and (2) that she did unlawfully and feloniously place Katherine R. Taylor in a house of prostitution with intent that she should live a life of prostitution in violation of § 18.1-205. The jury found defendant guilty as charged under the first count and fixed her punishment at 5 years imprisonment and a fine of $500. The trial court overruled defendant's motion to set aside the verdict on the grounds that it was contrary to the law and the evidence and entered judgment in accordance with the verdict. We granted defendant a writ of error.

The defendant did not testify or offer any evidence in her behalf.

The evidence discloses that the defendant and Mrs. Katherine Taylor had been friends for quite awhile, but had not seen each other "in years." In September 1961, pursuant to a telephone call made by defendant to Katherine Taylor the parties met in a restaurant in the city of Norfolk. There they had a "general conversation." They discussed their financial difficulties. Defendant revealed that she had a $1,000 fine to pay and Katherine Taylor said she had unpaid bills. Defendant stated that she had "some numbers that she could contact and we could both make some money"; and that "she had the best clientele in town."

About 10 days later defendant went to Katherine Taylor's home to ascertain if she was still interested in the proposition. Later they toured different sections of the city to locate an apartment, but a location was not decided upon. Subsequently defendant advised her that she had rented an apartment at Ocean View. According to the landlord's desk clerk, defendant, who was accompanied by her husband, Harry Clinton, rented the one-room efficiency apartment at 9630 1st View street in the fictitious name of "Mr. and Mrs. Charles Morrison." Katherine Taylor testified that defendant called "different numbers" to let "the men know that she (defendant) was in business." When asked what her compensation was, she replied that the men paid $10 and that she received $5. Defendant received one-half because she had the "numbers" and

had to pay the telephone bill and the "upkeep of the apartment." With one exception, all of the engagements Katherine Taylor had with men for sexual intercourse secured by defendant were had at the defendant's apartment. Prostitution was not a new experience for Katherine Taylor. She testified that she had formerly worked with defendant in Richmond.

The defendant's apartment was kept under surveillance by Norfolk police officers for four days, during which time they observed men visit the apartment. Part of the time officer Earl H. Beach was stationed in the adjoining apartment where he heard conversations and sounds which tended to show that the premises were used as a house of prostitution. This evidence was obtained by listening through the medicine cabinet in the wall dividing the two apartments and by an amplifying device "stuck in the wall."

On the morning of October 25, 1961, a man, later identified as S. N. Edwards, entered the apartment. The defendant arrived shortly thereafter. About 10 minutes later she and Betty Johnson left the premises and took a seat in Harry Clinton's automobile which was parked across the street in the Colonial Stores' parking lot. The police officers broke the glass in the door of the apartment, entered and found Katherine Taylor and Edwards undressed and preparing for sexual intercourse. They, along with defendant, her husband and Betty Johnson, were taken into custody and the indictment of defendant followed.

Here, defendant argues that the trial court erred (1) in refusing to declare a mistrial for admitting certain evidence of S. N. Edwards which tended to show that she formerly operated a house of prostitution at another place; (2) in admitting evidence obtained in the adjoining apartment through the use of a mechanical listening device stuck in the wall which separated the two apartments; and (3) in refusing Instruction No. D-3. These questions will be discussed in the order mentioned.

S. N. Edwards testified that after a telephone conversation with defendant he went to her apartment. There the conversation between the two was "more or less a sparring deal" as he was attempting to identify himself and show he was not connected with law enforcement. He told her that the purpose of the visit was to meet her and look the place over as he had out-of-town friends who might be interested in contacting her.

On direct examination Edwards testified as follows:

Q. Tell us what actually was said. * * *.

"A. All right; what I said first. I told her that I thought her name was familiar and I asked her if she operated in the other place in town.

"The Court: Operated what? * * *?

"A. Well, a house of prostitution, but those words weren't used. I didn't ask her.

"The Court: What did you use? How did you come to the understanding?

"A. Just what I said, sir, because it was obvious what was going on. It was just a line of conversation and it was taken, well, that both parties knew what was going on.

"She asked me if I had ever visited places down at East Ocean View and I told her I had not and she mentioned some other places, I believe, but I don't recall where it was and I said, no, that I had never visited any other places.

"Then I asked her, to prolong the conversation, if she was ever down at Lynnhaven.

"Mr. Reid: Your Honor, I object to this.

"The Court: Overruled.

Mr. Reid: I save the point.

"A. She says, 'Yes, I did.' I said, 'Well, did you have a young girl working for you that had long hair and wore it up in a pony tail, about five years ago?' Then she mentioned some name which was vague to me because I was just carrying on a conversation and Mrs. Clinton and this Betty were dressing, that is, putting on their hats, getting ready to go out."

The defendant now argues that the Commonwealth was thus allowed to present evidence that five years previously the defendant ran a house of prostitution; and that to compound the error further evidence was allowed tending to show that the defendant had a young girl working for her at that time.

But she made no such objection. Her objection was to the question asked her by Edwards whether "she was ever down at Lynnhaven." She offered no objection at all to the further question asked her by Edwards about a young girl working for her about five years ago, and she made no answer to that question.

Rule 1:8 of the Rules of Court requires that the grounds for objection to the admissibility of evidence be stated with reasonable certainty, and if it does not appear from the record to have been so stated, "such objections will not be considered by this Court except for good cause shown or to enable this Court to attain the ends of justice." Here, counsel for defendant stated no reason for the objection to Edwards' testimony under question at the time it was made and offered no motion to strike such evidence. Counsel merely said "Your Honor, I object to this." After the objection was overruled, counsel stated "I save the point."

Moreover, Katherine Taylor thereafter testified without objection that defendant told her before the apartment was rented "she had the best clientele in town." She stated that defendant during her conversa-

tion with Edwards "described the other place she used to have and was talking about a girl with red hair." On cross-examination she testified that she had "worked with" defendant in Richmond. The time was not designated, but it must have been several years prior to this incident because she had previously stated that she had not seen defendant "in years."

Helen Buckridge said she had only one "paid date" in the apartment for which she received $10 and that she gave defendant one-half of it. At the time she was introduced to defendant, she stated that defendant told her "she needed money and she had a fine to pay and that she was going to start operations again if she could get some girls and get a place." There was no objection made to this testimony. The testimony of Helen Buckridge and Katherine Taylor clearly established that defendant had formerly operated such an illicit business.

Aside from the fact that the grounds for the objection to Edwards' testimony were not stated at the time the objection was made, there has been no good cause shown why the requirement of Rule 1.8, *supra,* should not be applied. The evidence amply supports the conviction of the defendant and it is not necessary to disregard the requirement to state the grounds for obpection with reasonable certainty in order to attain the ends of justice.

Here the Commonwealth was not seeking to prove independent and unconnected crimes in violation of

the settled principle recently stated in *Fleenor* v. *Commonwealth,* 200 Va. 270, 275, 105 S. E. 2d 160. Evidence of other offenses may be admitted only when it shows motive, intent or guilty knowledge, or is connected with or leads up to the offense for which the accused is on trial, *Colvin* v. *Commonwealth,* 147 Va. 663, 669-70, 137 S. E. 476; or when there is only incidental disclosure of other offenses, *Barber* v. *Commonwealth,* 182 Va. 858, 867, 30 S. E. 2d 565. The evidence now claimed to be error came from the defendant in a conversation with Edwards in which the defendant's object, according to Edwards, was "to make sure I wasn't a member of the law or something like that" and, as stated, the only objection she made was to the question of whether she was ever down at Lynnhaven, to which she replied, "Yes, I did."

At the conclusion of the Commonwealth's evidence, defendant moved for a mistrial on the grounds that the testimony of Edwards relating to the former operation of a house of prostitution was prejudicial and improper and that there was no basis for its admission. This motion and others made at the time were overruled.

Whether a motion for a mistrial should be granted or refused rests within the sound discretion of the trial court, and the exercise of this discretion will not be be disturbed unless abused. *Braxton* v. *Commonwealth,* 195 Va. 275, 279, 77 S. E. 2d 840; *Mack* v. *Commonwealth,* 177 Va. 921, 927, 15 S. E. 2d 62; 23A C. J. S., Criminal Law § 1384, pp. 1027, 1028. Such a motion

should be promptly made after a party has full knowledge of the facts and circumstances relied upon. *Crockett* v. *Commonwealth,* 187 Va. 687, 706, 707, 47 S. E. 2d 377.

We find that it was not reversible error for the trial court to admit Edwards' testimony in question, and that the trial court did not abuse its discretion in overruling the motion for a mistrial at the conclusion of the evidence.

The defendant contends that the use by an officer of a mechanical listening device stuck in the partition wall of an adjoining apartment in obtaining evidence constituted an unlawful search and seizure under the Fourth Amendment to the Constitution of the United States and Section 10 of the Constitution of the State of Virginia. Thus, she says that it was reversible error to admit such evidence.

Goldman v. *United States,* 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322, involved a situation where Federal agents placed a detectaphone against a partition wall and heard conversations between members of a conspiracy. There was no physical invasion of the premises occupied by defendant in obtaining this evidence. The court held that the questioned evidence was not inadmissible on the ground that use of the detectaphone was in violation of the Fourth Amendment.

The defendant relies heavily upon *Silverman* v. *United States,* 365, U. S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734. There the petitioners were convicted on an in-

dictment charging certain gambling offenses. Police officers were permitted to testify as to incriminating conversations between the petitioners which were overheard through an electronic listening device. This device was described as a microphone with a spike approximately one-foot long attached to it and it also consisted of an amplifier, earphones and a power pack. The officers entered a vacant house and inserted the spike several inches into a crevice of the party wall and made contact with a heating duct which served the adjoining house occupied by the petitioners. Such contact converted petitioners' entire heating system into a conductor of sound and conversations in the house could be heard through the earphones.

In holding that the use of the device violated the Fourth Amendment, the court observed: "* * * For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners. * * *." It pointed out that in the *Goldman* case, *supra,* "the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area," and expressly declined to "re-examine" the case.

The *Silverman* case is factually different from the case at bar and it is not controlling. Officer Beach was asked if the instrument used was a spiked device and he responded "Yes, sir; small device." That is the only description given of it. The uncontradicted evi-

dence is that it was not driven into the wall, but was "stuck in" it. This is the only evidence as to any penetration of the party wall and it is reasonable to assume that the penetration was very slight such as one made by a thumb tack to hold the small device in place. The record does not show that the eavesdropping was accomplished through "an unauthorized physcial penetration into the premises" occupied by defendant. Thus, we hold that the evidence obtained by means of the listening device did not constitute a violation of the Fourth Amendment to the Constitution of the United States or Section 10 of the Constitution of the State of evidence.

Finally, defendant argues that the trial court erred in refusing to grant Instruction No. D-3. It reads:

"The Court instructs the jury that, while they may find a verdict upon the unsupported testimony of an accomplice, such evidence is to be received with great caution, and the Court, in this case, warns the jury of the danger of basing a verdict on the unsupported testimony of an accomplice.

"The Court further instructs the jury that the testimony of an accomplice must be received with great care and caution, and if you believe the testimony of an alleged accomplice was false, and that he was induced to testify falsely either by fear of punishment or hope of reward, you must disregard that testimony in its entirety."

The defendant says that she was entitled to this instruction because there was evidence that Katherine Taylor was an accomplice and no direct corroborating evidence that she received money from Katherine Taylor's earnings as a prostitute, and because Katherine Taylor had hope of reward of receiving a lighter sentence on a conviction for which she had not been sentenced.

As a result of the raid on defendant's premises three misdemeanor charges were placed against Katherine Taylor. At the time of defendant's trial two of the charges had been dismissed and she had been convicted on a plea of guilty to the third charge, but had not been sentenced as the case had been continued for that purpose. Captain Charles D. Grant testified that she had "been promised nothing" by the police.

If Katherine Taylor was not an accomplice, or if the verdict did not rest on her unsupported testimony, then it was not error to refuse the instruction.

"The general test to determine whether or not a witness is an accomplice is to determine whether he could be indicted for the same offense." *Guthrie* v. *Commonwealth,* 171 Va. 461, 469, 198 S. E. 481, and cases there cited.

State of Arizona v. *Green,* 60 Ariz. 63, 131 P. 2d 411, involved a question of whether the prosecuting witness whose earnings defendant was accused of receiving was an accomplice. In holding that the test to be applied

was whether she could be indicted for the same crime, the court stated:

"• • • It is obvious that the prosecuting witness could not have been tried for receiving the earnings of a prostitute from herself. We think, therefore, that she was not an accomplice within the meaning of the statute, • • •." 60 Ariz. at pp. 67, 68, 131 P. 2d at p. 413.

Katherine Taylor, a prosecuting witness, could not have been legally indicted under § 18.1-208 for receiving money from her own earnings as a prostitute for a consideration not deemed good and valuable in law. Such being the case, under the principle enunciated in *Guthrie* v. *Commonwealth, supra,* she was not an accomplice. Moreover, her evidence was not unsupported, and the trial court was correct in refusing Instruction No. D-3.

For the reasons stated the judgment appealed from is

Affirmed.